

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**LARRY DENNIS,
Claimant Below, Petitioner,**

vs.) **No. 17-0118** (BOR Appeal No. 2051598)
(Claim No. 2007212843)

FILED

November 22, 2017
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**MURRAY AMERICAN ENERGY, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

Larry Dennis was denied an award of attorney's fees following the successful protest of a denial of medical benefits. We are asked to determine if the request for attorney's fees was properly denied. After review, we find the denial was proper. We further find upon consideration of the standard of review, the briefs, and the record, that there is no substantial question of law or prejudicial error necessitating oral argument. As such, a memorandum opinion is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Dennis successfully protested the claims administrator's February 24, 2016, denial of medical benefits. As the protest was successful, Mr. Dennis, through his attorney M. Jane Glauser, filed a petition for attorney's fees in the amount of \$437.50. On September 7, 2016, the Office of Judges denied Mr. Dennis's petition for attorney's fees because the record showed that the statutory maximum of \$2,500.00 in attorney's fees had been awarded between February 27, 2013, and April 9, 2015. The Order was affirmed by the Board of Review on January 18, 2017.

Mr. Dennis asserts West Virginia Code § 23-5-16(c)(2013) limiting the award of attorney's fees for the successful protest of denied medical benefits to \$500.00 per protest and \$2,500.00 per claim is an unconstitutional denial of due process of law for claimants and their counsel, as it fails to guarantee access to the judicial system. The arbitrarily set statutory maximum award makes it difficult for claimants to find representation due to a lack of financial incentive on the part of attorneys. Murray American Energy, Inc., through its attorney Edward George III, argues the statute is constitutional and does not interfere with a claimant's ability to retain counsel.

We find that Mr. Dennis had reached the statutory maximum for payment of attorney's fees in relation to successful protests of the denial of medical treatment. Therefore the denial of the attorney's fee was proper. West Virginia Code §23-5-16(c) does not deprive claimants of due process or the ability to retain counsel as exhibited by Mr. Dennis himself, who has maintained

representation by counsel since at least 2010. While Mr. Dennis couches his argument as a constitutional one, it is actually one of public policy. We recognize Mr. Dennis's frustration with the statutory maximum attorney's fees contained in West Virginia Code §23-5-16(c); however, as we noted in *Kasserman and Bowman v. Cline*, 223 W.Va. 414, 675 S.E.2d 890 (2009), public policy arguments "are more appropriately directed to the Legislature".

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Elizabeth D. Walker